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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
Petition on Behalf of the Louisiana Public Service) PR Docket No. 94-107
Commission for Authority To Retain Existing)
Jurisdiction over Commercial Mobile Radio Services)
Offered Within the State of Louisiana)

REPORT AND ORDER

Adopted: May 4, 1995;

Released: May 19, 1995

By the Commission:

I. INTRODUCTION

1. In August 1994, the Louisiana Public Service Commission ("Louisiana PSC" or "LPSC"), on behalf of that state, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services ("CMRS").¹ Nineteen parties filed pleadings relating to the Petition.² By this action, we deny the Petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio)

¹ Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain existing Jurisdiction over Commercial Mobile Radio Services Offered with the State of Louisiana, PR Docket No. 94-107, filed August 1994 (hereinafter "Louisiana Petition").

² A list of parties that filed pleadings in this proceeding appears at Appendix A.

telecommunications services.³ Among other things, Congress: (1) established new classifications of “commercial” and “private” mobile radio services (“CMRS” and “PMRS,” respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;⁴ (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;⁵ and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act’s public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.⁶

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate “the entry of or the rates charged” for CMRS and PMRS services, although states are permitted to regulate the “other terms and conditions” of CMRS.⁷ As an exception to this general rule, Congress also provided that, if a state had “any regulation” concerning the rates for any commercial mobile service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) “market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;” or (2) “such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.”⁸

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must “clear substantial hurdles” in demonstrating that

³ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (“OBRA” or “Budget Act”), *codified in principal part at* 47 U.S.C. § 332.

⁴ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order*), *reconsideration pending*.

⁵ National Telecommunications and Information Administration Organization Act, § 113(b)(1).

⁶ The competitive bidding methodology is to promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays...” 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote “investment in and rapid deployment of new technologies and services.” 47 U.S.C. § 309(j)(4)(C)(iii).

⁷ See 47 U.S.C. § 332(c)(3)(A).

⁸ See 47 U.S.C. § 332(c)(3)(B).

continued regulation is warranted.⁹ We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:¹⁰

[I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.¹¹ In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.¹² Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.¹³ We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.¹⁴ In *Louisiana PSC* the Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising

⁹ See *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

¹⁰ *Id.*, 9 FCC Rcd at 1421.

¹¹ *Id.*, 9 FCC Rcd at 1504.

¹² 47 C.F.R. § 20.13.

¹³ See *CMRS Second Report and Order*, 9 FCC Rcd at 1505.

¹⁴ Under *Louisiana PSC*, the Commission may preempt State regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. *Louisiana Pub. Ser. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. See *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Illinois Bell Tel. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *National Ass'n of Reg. Util. Comm'ners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

Federal jurisdiction with respect to “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services.”¹⁵ Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

III. DECISIONAL FRAMEWORK

6. In order to prevail on the merits, the LPSC must sustain its statutory burden of demonstrating that “market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.”¹⁶ A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties’ debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state’s petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service¹⁷ have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

7. Since the Budget Act does not explicitly construe or elaborate on the phrase “market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory,” we look to the “design of the statute as a whole and its object and policy” to give that phrase meaning.¹⁸ We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.¹⁹ We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive

¹⁵ *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

¹⁶ 47 U.S.C. § 332(c)(3).

¹⁷ Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the LPSC Petition is oriented to the provision of cellular service.

¹⁸ See *Crandon v. United States*, 494 U.S. 152, 157 (1990); *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

¹⁹ See 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

market operations.²⁰ The more formal description, however, is whether rates fall within a “zone of reasonableness” that is bounded at one end by the “investor interest in maintaining financial integrity and access to capital markets” and at the other by the “consumer interest in being charged non-exploitative rates.”²¹ Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers’ costs and earnings,²² but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.²³ These principles define basic components of a state’s demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a “zone of reasonableness,” which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

²⁰ See Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

²¹ See, e.g., FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); see also FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

²² See FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a “rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier’s] rates on its own costs.”) (citation omitted); see also Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh’g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

²³ See, e.g., Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

Mobil’s argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional “non-cost” incentives on the evidence of a need for increased supplies.

Id. at 316. See also Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm’n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

8. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: “no State ... shall have any authority to regulate” CMRS rates.²⁴ As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) (“State Preemption”), express an unambiguous congressional intent to foreclose state regulation in the first instance.²⁵ Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,²⁶ and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.²⁷

9. Unlike some of the opponents of the LPSC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;²⁸ (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed “rapidly” through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;²⁹ and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.³⁰

10. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood

²⁴ 47 U.S.C. § 332(c)(3).

²⁵ *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

²⁶ 47 U.S.C. § 332(c)(1)(A).

²⁷ 47 U.S.C. § 332(c)(1)(C).

²⁸ OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

²⁹ See OBRA § 6002(a), amending Section 309 of the Communications Act.

³⁰ See 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

that such a market was still evolving,³¹ and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.³² Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.³³

11. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

12. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Louisiana or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such

³¹ The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

³² *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

³³ *Id.*

conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.³⁴ Other Federal agencies have taken similar positions.³⁵ One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."³⁶ It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.³⁷ Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.³⁸

13. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.³⁹ For example, we have attempted to heighten cellular competition

³⁴ See, e.g., Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

³⁵ See Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

³⁶ United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

³⁷ Cf. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord Miles v. Apex Marine Corporation*, 489 U.S. 19 (1990); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173 (1959).

³⁸ Cf. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

³⁹ See, e.g., GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. See *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate

at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.⁴⁰ We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.⁴¹ Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

14. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.⁴² As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,⁴³ not a policy that is balkanized state-by-state.

15. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work.

regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

⁴⁰ See *Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

⁴¹ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992).

⁴² If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

⁴³ See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

[B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:⁴⁴

[i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

16. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions⁴⁵ -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

17. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,⁴⁶ and such conditions can produce good results for consumers.⁴⁷ In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

⁴⁴ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

⁴⁵ See 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

⁴⁶ In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. See D. Carlton & J. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

⁴⁷ See, *e.g.*, W. Baumol, J. Panzar & R. Willig, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* 15-46 (1982).

18. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance (“SCP”) analysis,⁴⁸ which is a standard paradigm of modern industrial organization analysis.⁴⁹ This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

19. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce “specific allegations of fact,” to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding “anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers.”⁵⁰ We also requested “[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces,” and we indicated that we would consider such evidence “especially probative.”⁵¹

⁴⁸ Section 20.13(a)(1) requires states to include “demonstrative evidence” establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

⁴⁹ *See, e.g.*, F. Scherer & D. Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 4-7 (3d ed. 1990) (“Scherer and Ross”); D. Carlton & J. Perloff, *MODERN INDUSTRIAL ORGANIZATION*, chs. 1, 9 (2d ed. 1994); J. Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION* 1-3 (1988).

⁵⁰ 47 C.F.R. § 20.13(a)(2)(vi).

⁵¹ 47 C.F.R. § 20.13(a)(2)(vii).

20. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,⁵² and “an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.”⁵³ We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.⁵⁴ In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on “trends” in each commercial radio provider’s rates and customer base⁵⁵ and on “opportunities for new providers to enter into the provision of competing services” as well as “an analysis of any barriers to such entry.”⁵⁶ In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,⁵⁷ the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

21. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

22. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.⁵⁸ Under the case law potential entry must be reasonably prompt, a typical period

⁵² 47 C.F.R. § 20.13(a)(2)(i) and (ii).

⁵³ 47 C.F.R. § 20.13(a)(2)(iv).

⁵⁴ 47 C.F.R. § 20.13(a)(2)(viii).

⁵⁵ 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

⁵⁶ 47 C.F.R. § 20.13(a)(2)(v).

⁵⁷ *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

⁵⁸ See, e.g., *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F.Supp. 1166, 1174 (N.D. Cal. 1986) (“the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high”), citing *United States v. Waste Management, Inc.*, 743 F.2d 976, 982- 83 (2d Cir. 1984). See also *American Bar*

being two years from the present in order to expect a significant impact on existing competitors,⁵⁹ and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing Louisiana have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

Association, I ANTITRUST LAW DEVELOPMENTS (THIRD) 307-11 (1992) and cases cited therein.

⁵⁹ See *FTC v. Owens-Illinois, Inc.*, 681 F.Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning “the extensive present and future intermaterial competition in the glass and other packaging industries,” “[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic”); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: “In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact”) (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

BROADBAND PCS AUCTION RESULTS

Louisiana					
MTA #	Freq. Blk.	State	Market	Winning Bidder	Winning Bid
M017	A	Louisiana	New Orleans-Baton Rouge	WirelessCo, L.P.	\$93,949,001
M017	B	Louisiana	New Orleans-Baton Rouge	PCS PRIMECO, L.P.	\$89,475,484
M007	A	Texas	Dallas-Fort Worth	PCS PRIMECO, L.P.	\$87,500,578
M007	B	Texas	Dallas-Fort Worth	WirelessCo, L.P.	\$88,444,000
M014	A	Texas	Houston	American Portable Telecommunications, Inc.	\$83,888,837
M014	B	Texas	Houston	PCS PRIMECO, L.P.	\$82,680,425

23. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It is happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.⁶⁰ The advent of

⁶⁰ See, *e.g.*, COMM. DAILY, Apr. 24, 1995, "Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); COMM. DAILY, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is

PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.⁶¹ Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

24. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

25. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great

\$24.99, with additional min. at 29 cents in home county, 99 cents elsewhere”); M. Mills, *Wireless: The Next Generation*, WASH. POST, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal -- Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, INFORMATIONWEEK, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

⁶¹ See, e.g., Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 (“Description of Transaction and Public Interest Statement”) at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending*; Craig O. McCaw, 9 FCC Rcd at 5862-63.

weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

26. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.⁶² For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.⁶³ Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.⁶⁴ Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

27. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

IV. LOUISIANA PETITION

28. The Louisiana Public Service Commission (LPSC) requests authority to continue exercising authority over the rates charged, services rendered, and the setting of other terms and conditions for CMRS.⁶⁵ Louisiana asserts that it maintained regulations concerning CMRS rates in effect as of June 1, 1993 and is petitioning to continue this rate regulation in

⁶² See, e.g., J. Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION* 209-70 (1988).

⁶³ *Id.*, 239-270.

⁶⁴ In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

⁶⁵ See *Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana*, PR Docket No. 94-107, at 1 (Louisiana Petition).

order to benefit ratepayers.⁶⁶ The state asserts that such regulation consist of: (1) requiring companies to register to operate in Louisiana; (2) addressing customer complaints; (3) remedying discriminatory rates; (4) setting/approving interconnection rates that landline providers charge CMRS providers; (5) regulating rates by intervening when necessary, *e.g.*, in response to complaints; (6) monitoring rates; (7) remedying unlawful, anticompetitive and/or unwarranted practices; and (8) reviewing proposed mergers.⁶⁷ Louisiana also states that it requires any person wishing to do business as a cellular carrier in the state to file its identity, rate tariff, technical and service area information, *inter alia*, with the LPSC.⁶⁸

29. The Louisiana Commission voted in July, 1994 to open a docket to investigate the merits of rate regulation for cellular and other wireless service providers, on a rate of return or some other basis.⁶⁹ The results of the investigation, the LPSC asserts, will include recommendations as to the type of regulation Louisiana should adopt. After the investigation, Louisiana states that it may file a petition to initiate additional rate regulation.⁷⁰ Pending the outcome of that proceeding, Louisiana requests continued authority to regulate cellular carriers as it has in the past.⁷¹ The LPSC states that it intends to keep its current rules in place, but that it cannot now determine what additional or different rules may be required in the future. The LPSC argues in order to avoid rejudging issues it must complete its investigation before specifying a different regulatory structure than is in place today.⁷²

V. CASE ON THE MERITS

A. Louisiana's Case in Principal Part

30. Louisiana asserts that the duopoly structure of the cellular services market results in rates which may be unjust and unreasonable.⁷³ The state also contends that cellular services may be priced far above cost, bringing in super normal profits, and carriers may be

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 7-23.

⁶⁸ *Id.* at 49.

⁶⁹ *Id.* at 2-3 n.2.

⁷⁰ *Id.*

⁷¹ *Id.* at 40-41.

⁷² *Id.* at 49.

⁷³ *Id.* at 23, 27-29.

consciously engaging in parallel pricing and/or dividing markets.⁷⁴ Moreover, the LPSC argues, in certain local markets an “international” company (BellSouth) is competing against “a much smaller” cellular provider (Radiophone) that supports continued regulation “to protect it from BellSouth.”⁷⁵ Substantial entry barriers still exist in the cellular market, according to Louisiana.⁷⁶ The LPSC also contends that there are no existing substitutes for cellular service, and that new services and technologies such as PCS and wide area Specialized Mobile Radio (“SMR”) service are not viable competitors to cellular because their cost and pricing structures differ from cellular’s and they are not yet widely available to consumers.⁷⁷

31. The LPSC contends that it should be allowed to retain regulatory authority until the market can better produce high quality service at affordable rates.⁷⁸ Louisiana has been developing a comprehensive telecommunications plan, and it argues that its continued regulatory authority over CMRS rates is necessary to realize the plan’s goals.⁷⁹ In addition, the LPSC states that it must be able to influence market participants in order to achieve the goal of universal service and allocate the costs of providing such service.⁸⁰

32. Louisiana also asserts that it should be allowed to retain rate regulatory authority in order to assess the level of competition in the Louisiana cellular market and to control rates as necessary, to compensate for any discovered supra-competitive rates.⁸¹ The LPSC states that it is “uniquely experienced and positioned to handle”⁸² this task and, in particular, that it is more accessible to consumers, in terms of proximity, availability, and accountability, than the FCC.⁸³ The LPSC notes that this Commission refers complaints it

⁷⁴ *Id.* at 28-29.

⁷⁵ Louisiana PSC Reply at 2-10.

⁷⁶ Louisiana PSC Petition at 30. In support of this assertion, the Louisiana PSC generally cites to the *CMRS Second Report and Order*.

⁷⁷ Louisiana PSC Reply at 11-12.

⁷⁸ Louisiana Petition at 30.

⁷⁹ *Id.* at 43. The LPSC also asserts that its regulatory framework is pro-competitive. *Id.* at 34-35.

⁸⁰ *Id.* at 46.

⁸¹ *Id.* at 38-39.

⁸² Louisiana PCS Reply at 15.

⁸³ *Id.* at 15-16; Louisiana Petition at 31.

receives from cellular subscribers in Louisiana to the LPSC for resolution.⁸⁴ Although the LPSC apparently believes the OBRA granted the FCC jurisdiction to address intrastate CMRS matters,⁸⁵ the LPSC claims that “[a]ny attempt by Congress and the FCC to preempt the authority of the LPSC to regulate the rates charged and services rendered by cellular providers is a violation of the Tenth Amendment of the United States Constitution.”⁸⁶

B. Pleadings of the Parties on Specific Matters

1. Market Conditions; Competition

33. BellSouth, Century, GTE and McCaw assert that the LPSC failed to meet its burden by failing to show that current market conditions do not adequately protect consumers. BellSouth states that a showing that market conditions “may” fail to protect consumers does not suffice.⁸⁷ Century, McCaw, CTIA and GTE assert that Louisiana provides little or no evidence of the types identified by this Commission as relevant to the statutory showing, and that competition in the CMRS marketplace is likely to increase with the advent of SMR, PCS, and other services that will act as substitutes for cellular.⁸⁸ Century also asserts that the LPSC cannot rely on statements by the FCC and others to meet its burden, and the state fails to provide evidence of unique circumstances in Louisiana that would warrant a departure from the general preemptive action of the statute.⁸⁹

34. Louisiana responds that Congress, the Department of Justice, and this Commission have expressed concern that competitive market conditions do not exist in each state, and this Commission also has determined that significant anti-competitive problems may exist because of the duopoly, and has found that cellular markets are not fully competitive.⁹⁰ Louisiana states that the Department of Justice reached similar conclusions as

⁸⁴ Louisiana PSC Reply at 15-16; Louisiana Petition at 9-10.

⁸⁵ See Louisiana Petition at 9 n.4.

⁸⁶ Louisiana Reply at 16.

⁸⁷ Comments of BellSouth Corp., on behalf of BellSouth Cellular Corp. and Mobile Communications Corp. of America (collectively, BellSouth), at 2, 4-6, 12-13 & nn.10, 11); accord McCaw Comments at 3, 11-15.

⁸⁸ See Century Comments at 7-8; CTIA Comments at 18-24; GTE Comments at 12-16, 21 & app. A at 8; McCaw Comments at 3.

⁸⁹ Century Comments at 7-8.

⁹⁰ Louisiana Reply at 3-4, citing *CMRS Second Report and Order*.

recently as July 1994.⁹¹ It also asserts that the duopoly market conditions alone fail to protect Louisiana subscribers from unjust and unreasonable rates, and that its regulation is warranted because cellular rates in Louisiana are higher than in similar jurisdictions.⁹²

2. Paging and Other CMRS Services

35. BellSouth notes that the LPSC seeks to regulate all CMRS services, including paging, but it submits no evidence concerning rates, market conditions, or discriminatory conduct by non-cellular CMRS providers other than to reference a case involving unauthorized solicitations.⁹³ AirTouch Paging agrees, and asserts that the paging industry is characterized by relatively low barriers to entry, a variety of frequencies, many facilities-based competitors, and healthy price competition.⁹⁴ AMSC states that Louisiana petition fails to make a specific showing as to Mobile Satellite Service.⁹⁵ AMSC urges the Commission to preempt state regulation of the MSS ground segment, based on the LPSC's failure to make a contrary showing, and based on past Commission policy of general preemptive action in similar instances.⁹⁶ AMTA, describing the high degree of competition among rates of private land mobile systems which have been reclassified as CMRS, opposes any state regulation of the entry or rates of such systems.⁹⁷ AMTA asserts that the petition is silent regarding intent to include reclassified private services within its regulatory framework, and the state provides no evidence that market conditions in this segment of the CMRS industry do not adequately protect subscribers.⁹⁸

3. Customer Complaints; Allegations of Anticompetitive or Collusive Conduct

36. BellSouth argues that the customer complaints cited by the Louisiana Commission are largely irrelevant. The carrier contends that the LPSC concedes that it has not determined

⁹¹ *Id.* at 4-5, *citing* United States v. Western Electric, Memorandum of the United States in Response to Bell Companies' motion for Generic Wireless Waivers, Civ. Action No. 82-0192 (filed July 25, 1994).

⁹² *Id.* at 6-7.

⁹³ BellSouth Comments at 14 & n.12.

⁹⁴ AirTouch Paging Comments at 8-9.

⁹⁵ AMSC Comments at 1-2.

⁹⁶ *Id.*, *citing* 9 FCC Rcd 1411, para. 41 (1994).

⁹⁷ AMTA Comments at 1, 6-7; *accord* E.F. Johnson Comments (requesting exemption of "local" SMR and 220 MHz land mobile systems from state rate regulation).

⁹⁸ *Id.* at 5-7.

whether the complaints are evidence of a widespread problem demonstrating current market failure.⁹⁹ In addition, BellSouth claims, the alleged instances of anticompetitive conduct are similar to interexchange carrier promotions permitted by this Commission.¹⁰⁰ In any event, BellSouth asserts, individual cases of possible discriminatory rates or practices can be addressed by this Commission under Sections 201, 202 and 208 of the Communications Act, 47 U.S.C. §§ 201, 202 and 208.¹⁰¹ Regarding Louisiana's allegations of impermissible tying arrangements, Century asserts that bundling of cellular service and equipment already has been addressed by the FCC.¹⁰²

4. Effect of State Regulation

37. BellSouth, CTIA and McCaw argue that state regulation results in higher rates.¹⁰³ The state responds that many parties attribute successes in the CMRS marketplace to "competition" and failures to "regulation." In response to arguments that the broadening customer base for cellular service in Louisiana is evidence of pro-competitive rates, Louisiana asserts that such broadening may be attributable to nothing other than declining cellular handset costs, rather than any decrease in service rates, and thus is not persuasive evidence of conditions in the cellular service market. Even assuming rates are decreasing, Louisiana argues, there is no evidence that the new rates are just and reasonable.¹⁰⁴ Louisiana also asserts that BellSouth and McCaw offer no evidence of how regulation has increased rates in Louisiana, and notes that BellSouth does not promise to reduce rates if cellular service is deregulated.¹⁰⁵ Indeed, the PSC notes that McCaw's claim that regulation has increased rates in Louisiana is at odds with that company's assertion that its rates have dropped twenty percent in the past two years.¹⁰⁶ The LPSC states that higher rates may indicate inadequate competition and a need for increased regulation, not any flaw in regulation.¹⁰⁷ Moreover, the LPSC notes that McCaw's economic consultant in this

⁹⁹ BellSouth Comments at 19.

¹⁰⁰ BellSouth Comments at 22-23.

¹⁰¹ BellSouth Comments at 23.

¹⁰² Century Comments at 2.

¹⁰³ BellSouth Comments at 3-4, 26-27, app. at 4-8 (Affidavit of Economist Dr. R. Rozek); CTIA Comments at 13; McCaw Comments at 29-33.

¹⁰⁴ Louisiana Reply at 5.

¹⁰⁵ *Id.* at 6-7 & n.2.

¹⁰⁶ *Id.* at 7 n.2, *citing* McCaw Opposition at 23.

¹⁰⁷ Louisiana Reply at 7 n.2.

proceeding suggests that prices in a regulated environment would be *below* an efficient level, not that they would be too high.¹⁰⁸

5. Timing

38. BellSouth contends that there is no statutory support for continuing rate regulation pending the completion of the Louisiana investigation.¹⁰⁹ BellSouth and McCaw assert that a state may petition to continue rate regulation only to the extent that it actually regulated rates as of June 1, 1993, and argue that the LPSC seeks to continue rate regulations that were not in effect on June 1, 1993.¹¹⁰ Louisiana replies that the petition seeks extension of the state's existing regulatory authority, not particular regulations.¹¹¹

C. Discussion

39. Section 332(c)(3) provides that a state petition shall be granted if it “demonstrate[s]” that market conditions for the service at issue fail to protect subscribers adequately from unjust, unreasonable, or unreasonably discriminatory rates. The LPSC has failed to make such a demonstration and, accordingly, we deny its petition.

40. The question whether CMRS market conditions in Louisiana are such that consumers require regulatory protection can be answered only upon consideration and analysis of tangible evidence concerning the structure, conduct and performance of that market, and the LPSC has not provided such evidence. It has submitted little or no data on CMRS infrastructure investment, earnings, the deployment of new services and technology, or existing service prices or pricing trends. Nor has it presented other information that would support a finding that CMRS licensees are restricting output or otherwise acting in an anti-consumer or anti-competitive manner. Although the LPSC has submitted information on consumer complaints, it consists essentially of a rough estimate of the number of complaints received last year concerning all commercial mobile radio services, and a laundry list of the various practices of which consumers complained.¹¹² No specific information is provided about those practices, or whether and how they were addressed by the LPSC. This evidence is not adequate to support a conclusion that market conditions fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.

¹⁰⁸ *Id.* at 7 n.3, *citing* Owen Affidavit on behalf of McCaw, at 17.

¹⁰⁹ BellSouth Comments at 15-16.

¹¹⁰ BellSouth Comments at 2-3; McCaw Comments at 18-20.

¹¹¹ Louisiana Reply at 3.

¹¹² *See* Louisiana Petition at Exhibit 11.

41. Indeed, it appears the LPSC itself has not made such a finding. Rather, the LPSC essentially asserts that market conditions “may” fail to protect subscribers in Louisiana. Although prior to filing its petition the LPSC initiated an proceeding to address that issue more definitively, the investigation apparently is now being held in abeyance.¹¹³ The relevant observation is that statements of uncertainty regarding market conditions do not satisfy the statute’s requirement that a state “demonstrate” that market conditions fail to protect subscribers adequately. Accordingly, we deny Louisiana’s petition.¹¹⁴

42. As a result of our decision, the State of Louisiana is precluded by Section 332(c)(3) from regulating “the rates charged” by any CMRS provider. The LPSC’s claim that the Tenth Amendment bars that result is neither explained nor supported, so it is not possible to respond to that claim in detail. We do note that the Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law;¹¹⁵ and where, as here, a federal agency acts within the scope of congressionally delegated authority, its actions have the same effect.¹¹⁶ Finally, we note that while the LPSC and several parties suggest that the OBRA has given this Commission jurisdiction over intrastate CMRS,¹¹⁷ nothing on this record persuades us that it is necessary to address questions concerning our jurisdiction in order to act on the merits of the LPSC Petition.

VI. REGULATION OF OTHER TERMS AND CONDITIONS

43. Prior to the OBRA, Section 332 prohibited the states from imposing “rate ... regulation” upon certain wireless telecommunications carriers.¹¹⁸ This prohibition was

¹¹³ See Letter from B. Almond, Executive - Federal Regulatory, BellSouth, to Deputy Chief, Policy Division, Wireless Telecommunications Bureau (Dec. 8, 1994) (attaching minutes of November 9, 1994, open session of the LPSC which described the LPSC’s vote to delay its investigation).

¹¹⁴ Our decision on the merits of this issue makes it unnecessary to address the question whether Louisiana was exercising rate regulation authority as of June 1, 1993.

¹¹⁵ See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); see also *Louisiana PSC*, 476 U.S. at 368-69 and cases cited therein.

¹¹⁶ *Louisiana PSC*, 476 U.S. at 369; *Capital Cities Cable, Inc. v Crisp*, 467 U.S. 691, 698-99 (1984).

¹¹⁷ See Louisiana Petition at 9 n.4; BellSouth Comments at 23.

¹¹⁸ The statute provided in relevant part that “[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service” 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

construed broadly to include almost all regulatory activity.¹¹⁹ Post-amendment, Section 332(c)(3) now prohibits states from regulating “the rates charged” for CMRS, but it expressly reserves to them the authority to regulate the “other terms and conditions of commercial mobile services.” Although there is no definition of the term “the rates charged” in the statute or its legislative history, there is legislative history regarding the “other terms and conditions” language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the LPSC is entitled to continue, despite our denial of its Petition.

44. The House of Representatives Committee on Energy and Commerce, reporting the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states may nonetheless regulate other terms and conditions of commercial mobile radio services. The Committee stated:¹²⁰

By “terms and conditions,” the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state’s lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under “terms and conditions.”

¹¹⁹ See, *e.g.*, *Telocator Network of America v. FCC* (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission’s interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). See also, *e.g.*, *American Teltronix (Station WNHM552)*, 3 FCC Rcd 5347 (1988) (“Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier.”), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990) (note omitted) (“state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute [A]ccompanying legislative history reveals that Congress recognized the Commission’s broad discretion to dictate which land mobile systems are to be regulated as private.”). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission’s Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990):

If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

¹²⁰ See H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261 (“House Report”).

45. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented here. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

46. First, although the LPSC may not prescribe, set, or fix rates in the future because it has lost authority to regulate “the rates charged” for CMRS, it does not follow, for example, that its complaint authority under state law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates.¹²¹ In consequence, it is conceivable that matters might arise under complaint procedures that relate to “customer billing information and practices and billing disputes and other consumer matters.” We view the statutory “other terms and conditions” language as sufficiently flexible to permit the LPSC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

47. Under the same logic, we also conclude that several other aspects of Louisiana’s existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the LPSC or whatever other agency the state decides is appropriate does not strike us as rate regulation, so long as nothing more than standard informational filings are involved. Nothing in OBRA indicates that Congress intended to circumscribe a state’s traditional authority to monitor commercial activities within its borders. Finally, we note that Louisiana’s regulation of the interconnection rates changed by landline telephone companies to CMRS providers appears to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not appear to be circumscribed in any way by Section 332(c)(3).

48. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of Louisiana’s existing regulation practice at issue.

VII. ORDERING CLAUSES

49. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. 332(c)(3), IT IS ORDERED that the Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana IS DENIED for the reasons set forth above.

¹²¹ *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person “complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof.” 47 U.S.C. § 208(a)(emphasis added).